[redacted]

specific authorization is such governmental intervention as to make joint venturers of the state and the utility. *Moose Lodge*, 407 U.S. at 177. Again, there is that interdependence and identity which cannot separate private from public.

4. *Government Is Directly Involved In The Business Of A Regulated Utility Corporation Which Is Engaged In A Public Function*

In contemporary society, government has assumed increasing responsibility for provision of basic services to the community. Among these are utility services which, because of cost, technology, or the like, are not generally available to the public without intervention of the state. Often government has undertaken to provide these basic services through its own resources as in the case of a municipal utility or a state chartered utility authority. Alternatively, the state may charter a corporation to provide these services through a certificate of convenience. In either case, the utility is engaged in a public service and is subject to government regulation and control.

When the state has made the political determination to provide, control, or regulate a basic service, it is that decision which defines a public function and gives rise to state action. It is that decision which marks the transformation from private business to public purpose. "That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966). *See also Marsh* v. *Alabama*, 326 U.S. 501 (1946).

This public function rule is not simply the creation of recent American law. Its origin lies in our common law tradition where, historically, the state exercised a regulutory function over those businesses and professions

which supplied scarce goods and services to the community. Those who provided such goods and services, whether tradesmen, physicians, innkeepers, or ferrymen, were held to a common law standard of fundamental fairness. *See* Note, *Constitutional Safeguards For Public Utility Customers: Power To The People*, 48 N.Y.U. L. Rev. 492, 495-597 (1973); Ilardi, *The Right To a Hearing Prior To Termination of Utility Services*, 22 Buffalo L. Rev. 1057, 1061-1068 (1973).

Regulation of businesses engaged in public services was carried over in American law, *Munn* v. *Illinois*, 94 U.S. 113 (1876), and is apparent in regulatory control of public utilities which has been in effect from an early period of our history. *See* Note, *supra*, 48 N.Y.U. L. Rev. at 497; Bonbright, *supra* at 5-7. It is demonstrated also in numerous judicial opinions which have held that regulated utilities are affected with a public purpose and are therefore held to a standard of fundamental fairness, now recognized as due process of law. *Columbo* v. *Pennsylvania Public Utility Commission*, 159 Pa. Super. 483, 48 A.2d 59 (1946); *Ihrke* v. *Northern States Power Co.*, 459 F.2d at 569; *Palmer* v. *Columbia Gas*, 479 F.2d at 165; *Davis* v. *Weir*, 328 F.Supp. at 321; *Stanford* v. *Gas Service Co.*, 346 F. Supp. at 722; *Bronson* v. *Consolidated Edison Co.*; 350 F. Supp. at 446.

It is clear that Metropolitan Edison falls within the public function index of action under color of law. The Commonwealth of Pennsylvania has assumed responsibility for provision of electric utility service. It has granted a certificate of convenience to Metropolitan which requires the corporation to serve a clear public purpose. It subjects the corporation to extensive regulation and requires compliance with a statutory standard of reasonableness. It has designated Metropolitan Edison as its exclusive agent in York County and requires the corporation to serve 300,000 residents in behalf of the Commonwealth.

C. A Comprehensive Analysis Demonstrates Action Under Color Of Law In This Case

This multi dimensional analysis demonstrates the substantial participation, relation, and involvement of the Commonwealth of Pennsylvania in the challenged practices of Metropolitan Edison. Every recognized index of state action is satisfied in substantial fashion by an interdependence and joint venture which is born of monopoly, pervasive regulation, and the specific authorization of *Tariff No. 41*. These are bolstered by mutual economic advantage to the corporation and the state as well as by the corporation's engagement in a public function for the public benefit and in behalf of the Commonwealth.

The conclusion which follows from this collective assessment in inescapable. Metropolitan Edison is not a private business in the ordinary sense. It is joined with government to carry out a public purpose. It acts under color of law and is therefore held to the mandate of due process of law in the termination of residential utility service.

III. A UTILITY CORPORATION WHICH TERMINATES RESIDENTIAL UTILITY SERVICE UNDER COLOR OF LAW IS REQUIRED BY THE FOURTEENTH AMENDMENT TO PROVIDE NOTICE AND OPPORTUNITY FOR IMPARTIAL EVIDENTIARY HEARING PRIOR TO TERMINATION

As noted at Part I, the purpose of this litigation is to attain practical due process safeguards for those consumers who face erroneous, mistaken, or arbitrary denial of residential utility service. This is nothing more than implementation of our historic commitment to fundamental fairness and the rule of law; it follows from recognition of residential utility service as a protected property interest which is subject to those procedural safeguards mandated for entitlements to necessities of life.

And to make practical implementation of this mandate, *Amicus* advocates a substantive, pretermination notice requirement coupled with a right to informal company review of disputed issues and a right to impartial review before the regulatory agency.

A. Utility Service Is A Property Interest And Entitlement To A Necessity Of Life Emcompassed Within The Fourteenth Amendment's Protection

> [Due process], unlike some legal rules is not a technical conception with a fixed content unrelated to time, place, and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162 (1950) [Frankfurter, J., concurring].

Recognizing that much of the wealth in this nation takes the form of government granted entitlements, this Court has rejected a narrow application of due process. While noting that subsidies, broadcast licenses, utility certificates of convenience, tax exemptions, public assistance, and unemployment compensation do not fall within traditional common law concepts of property, the Court has nevertheless applied Fourteenth Amendment protection to all such interests. *See generally Goldberg* v. *Kelly*, 397 U.S. 254, 262, n.8 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971).

> The Fourteenth Amendment's protection of "property", however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to any significant property interest, *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971), including statu-

tory entitlements. *Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972).

Residential utility service is within this broad protection. In the first instance, it is a necessity of high, fixed cost which cannot be deferred. See the report of the Washington Center for Metropolitan Studies, *Let Them Freeze In The Dark* (1974) 7-8, where it is noted that poor families pay in excess of 7% of income for utility services while upper income families pay as much as 2%. Where such a large part of income must be paid for a necessary service, it cannot be denied that a significant property is at issue. Moreover, utility service is an entitlement required by the Commonwealth to be provided to all consumers, subject only to reasonable, nondiscriminatory regulations governing eligibility and payment. 66 P.S. §§ 1123, 1171, 1172. Like public assistance, licenses, or certificates of convenience, it is a property interest subject to the Fourteenth Amendment and has been so recognized by federal courts. *See*, for example, *Palmer* v. *Columbia Gas*, 342 F. Supp. at 244, 479 F.2d at 165; *Stanford* v. *Gas Service Co.*, 346 F. Supp. at 719; *Bronson* v. *Consolidated Edison Co.*, 350 F. Supp. at 447. As such, residential utility service cannot be terminated without due process of law.

B. Due Process Of Law Requires Notice And Opportunity To Contest Prior To Termination Of Utility Service

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right they must be notified." *Baldwin* v. *Hale*, 68 U.S. 233 . . . . If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. *Fuentes* v. *Shevin*, 407 U.S. at 80.

This definitive declaration affirms the basic principle that due process of law requires prior notice and opportunity to be heard. Time and again, this rule has been stated and applied to all significant property interests, whether characterized as traditional property forms or entitlements. "[I]t needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment . . . procedure violates the fundamental principles of due process." *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 341, 342 (1969). "[O]nly a pretermination evidentiary hearing provides that recipient with procedural due process." *Goldberg* v. *Kelly*, 397 U.S. at 539. "[The] root requirement [of due process is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest . . . ." *Boddie* v. *Connecticut*, 401 U.S. at 379.

To the extent that entitlement to utility service is a significant property interest, therefore, this Court's decisions clearly require notice and opportunity to contest prior to termination.

> [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occured. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes* v. *Shevin*, 407 U.S. at 82.

Reaching a contrary conclusion on the question of the substance of due process, the court of appeals has legitimized a pay now—sue later remedy, citing *Flora* v. *U.S.*, 362 U.S. 145 (1960) as its authority. That decision, however, is inapposite because it involves tax collection, a matter frequently recognized as within the extraordinary situation exception to the prior hearing rule. *Fuentes*, 407 U.S. at 90-92, n.24. To apply this exception, there must be a showing that summary seizure or denial of property is directly necessary to secure an important gov-

ernmental or general public interest; that there is special need for prompt action; and that the person initiating the seizure is a government officer who determines, within a narrowly drawn statute, that summary seizure or denial is justified in a subjective instance. Thus, while summary seizure may be appropriate to collect the internal revenue of the United States, it is not justified in the residential utility context where there is no important government interest to be served, no special need, and no government officer to determine the need for summary termination. And no justification was offered or attempted below. Therefore, the court of appeals' conclusion is simply error.

C. Metropolitan Edison's Termination Practice Fails The Basic Requisites Of Due Process

Metropolitan Edison's termination practice is set forth in its *Electric Tariff No. 41*, a general statement of the corporation's unchecked right to terminate residential utility service upon its allegation of nonpayment and after "reasonable notice". This Tariff provides no procedural safeguards to the consumer, yet it has been justified by the court of appeals as consistent with a pay now—sue later approach to due process of law. *Jackson*, 483 F.2d at 763. It requires little inquiry to conclude that *Tariff No. 41* does not meet the basic requisites of due process.

The termination practice absolutely fails due process in that there is no notice of the right to contest. While the utility does give notice of its intention to terminate service, that notice is but a threat and no notice whatsoever in the sense of due process of law. *Mullane* v. *Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1949); *Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965).

> The company's shut-off notice does not provide the customer with the information he needs to quickly and intelligently take available steps to prevent the

> threatened termination of service. No mention is made in the notice of the fact that a dispute concerning the amount due might be resolved through discussion with representatives of the company . . . . The single reference to making "satisfactory arrangements" cannot be construed as informing a customer of his right to continued service pending a hearing if he disputes the accuracy of the bill or the propriety of the shut-off notice. [T]he notice does not inform the customer of any rights whatever. In short, the company's termination notice is, in the context of constitutional law, virtually no notice at all. "But when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. *Palmer* v. *Columbia Gas*, 479 F.2d at 166.

The termination practice further fails due process in that there is no prior opportunity to contest of which the corporation might give notice in the first instance.

Although there appears to be an inhouse investigative process for review of consumer complaints, it is so informal that consumers are not notified of its existence. Nor are Metropolitan Edison's collections employees required to refer disputed issues to this review process. Nor are consumers afforded an opportunity to participate in the investigation. And in no case does the consumer have a right to this review, limited though it is. Moreover, the consumer has no right to continued service pending the review.

In short, Metropolitan Edison's termination practice cannot comport with the most elementary notion of due process of law. It is a practice which is governed by a singular concern for protection of assets, which is premised upon a patronizing benevolence, which assumes the consumer's liability, and which ignores the rule of fundamental fairness. That is not due process of law.

CONCLUSION

Amicus urges that the judgment of the court of appeals is error. Metropolitan Edison acts under color of law and should be held to the mandate of the Fourteenth Amendment. The decision below should be reversed.

Respectfully submitted,

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26 April 1974

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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-5845

CATHERINE JACKSON, on behalf of herself and all others similarly situated,

Petitioner,

vs.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Motion for Leave to File Brief Amicus Curiae.

The Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego hereby respectfully move the Court for leave to file the attached brief *amicus curiae* in support of the petitioner, Catherine Jackson. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego are organizations established for the purpose of furnishing free legal services to those residents of southern Los Angeles, Alameda, and San

Diego counties who are unable to afford the services of private attorneys. Staff attorneys of these legal services programs have had extensive experience in representing clients who have been subjected to utility termination procedures similar to those employed by the respondent, Metropolitan Edison Company.

Additionally, attorneys for movants are extremely familiar with the "state action" and "due process" issues posed in the instant case. They are currently counsel of record in *Adams v. Southern California First National Bank* and *Hampton v. The Bank of California*, ... F. 2d ...., Nos. 72-1484, 72-1888 (Oct. 4, 1973), *petition for rehearing denied*, ... F. 2d .... (9th Cir. Mar. 12, 1974). These cases challenge the constitutional validity of California's Uniform Commercial Code provisions which authorize and govern a secured party's repossession of property without notice and an opportunity to be heard.

At the invitation of the United States Court of Appeals for the Ninth Circuit, counsel filed a brief *amicus curiae* and presented the oral argument for appellants in *Ouzts v. Maryland National Insurance Company*, 470 F. 2d 790 (1972), *vacated for rehearing en banc*, No. 26062 (9th Cir. June 20, 1973). The "state action" issue in *Ouzts* concerns whether bail bondsmen, empowered by the state to arrest an alleged fugitive and return him for trial, act "under color of law."

Movant legal services projects have also been heavily involved in *Adams v. Department of Motor Vehicles*, ... Cal. 3d ...., No. SAC 7959 (April 10, 1974), invalidating in part California's extrajudicial garageman's labor and materials lien and sale procedure (*See also, Quebec v. Bud's Auto Service*, No. 2 Civ. 41502 (May

10, 1973), *rehearing granted* (June 1, 1973)); and *Kruger v. Wells Fargo Bank*, No. S.F. 23014, *petition for hearing granted* (Cal. Sup. Ct. May 23, 1973), challenging California's extrajudicial banker's lien procedure.

Thus, as demonstrated by the varied situations cited above, involving the conduct of ostensibly private parties, the decision herein may have a substantial impact on a wide range of cases affecting low income persons in which movants are currently involved.

Movants seek leave to file a brief *amicus curiae* which presents a single comprehensive principle of state action. This principle should provide guidance to the Court in the disposition of this case as well as being instructive in a wide range of related cases now pending in lower courts. No such comprehensive view or principle of state action was presented in the Court of Appeals by the parties or *amici curiae* in the instant case; nor do movants believe that such a view will be presented by the parties in this Court.

Respectfully submitted,

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April 22, 1974.

IN THE

Supreme Court of the United States

October Term, 1974
No. 73-5845

CATHERINE JACKSON, on behalf of herself and all others similarly situated,

Petitioner,

vs.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief Amicus Curiae for the Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego.

This brief as *amici curiae,* in support of the position of the petitioner, Catherine Jackson, is filed by the Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego, on motion for leave to file said brief, as provided for in Rule 42 of the Rules of this Court.

Interests of Amici Curiae.

The interests of *amici curiae* are set forth in full in the attached Motion for Leave to File Brief Amicus Curiae.

Summary of Argument.

In this action, brought pursuant to 42 U.S.C. §1983, the issue of state action is presented in the context of a publicly regulated utility company's unilateral decision to terminate a customer's electrical utility service without notice and an opportunity to be heard. The threshold question is whether respondent utility company acted under color of law and within the ambit of the Fourteenth Amendment.

To analyze this issue, *amici* present a single comprehensive state action principle that is derived from prior decisions of this Court. This principle may be stated as:

> State action is present where significant governmental interests are promoted by a pattern of regulation delegating state power to ostensibly private persons who then act with the force of law.

An examination of the regulatory scheme involved in the instant case reveals that Pennsylvania has intertwined state policies with the operation of the so-called private utility company and its specific conduct challenged herein. Thus, when the comprehensive state action principle is applied to the instant case, a finding of state action is required.

Statement of the Issue Presented.

In a series of recent cases involving procedural due process, this Court has continually stated that except in the most extraordinary situations, a meaningful opportunity to be heard must be provided *before* a person may be deprived of a protected property interest. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400

U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254, (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). This case presents the prior hearing issue in terms of a publicly regulated utility's unilateral decision to terminate a customer's electrical service. In this action, brought pursuant to 42 U.S.C. §1983,[1] the threshold question is whether the respondent acted "under color of law" and within the ambit of the Fourteenth Amendment.[2] Recognizing that this issue is of paramount importance here as well as in the cases previously cited in *amici's* Motion to File Brief Amicus Curiae, *amici* will confine their brief to a discussion of the state action issue.

Initially, *amici* will set forth a general principle of state action as derived from prior decisions of this Court holding ostensibly private parties subject to the constraints of the Fourteenth Amendment. Then *amici* will demonstrate the applicability of this principle to the factual situation presented in the case at bar.

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[1]42 U.S.C. §1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

[2]The "under color of" state law requirement of 42 U.S.C. §1983 and the "state action" requirement of the Fourteenth Amendment have been construed to be of the same breadth and scope. *United States v. Price*, 383 U.S. 787, 794, n. 7 (1965).

ARGUMENT.

I

State Action Is Present Where Significant Governmental Interests Are Promoted by a Pattern of Regulation Delegating State Power to Private Persons Who Then Act With the Force of Law.

The Fourteenth Amendment is designed to protect individuals from state action, whether overt or covert, which deprives them of fundamental rights. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). The manner in which the state may infuse its policies and interests into objectionable conduct may take differing forms:

> "a state may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions of the [Fourteenth] Amendment extend to all action of the State . . . , whether it be action by one of these agencies or by another." *Ex Parte Virginia*, 100 U.S. 339, 347 (1879).

By focusing on the state's role in such conduct, this Court has developed an expansive body of state action law subjecting so-called private conduct to constitutional scrutiny.[3]

This expansive trend of decisions has been marked by the Court's reluctance to articulate a single state action formula. Rather, by a process of "sifting facts and weighing circumstances," the Court has sought to evaluate significant state policies and interests that

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[3]"Recognizing these concepts as expansive, ['under color of law' and state action] the Supreme Court has persistently refused to permit them to be shriveled by technicalities or to be emasculated by unnatural, artificial interpretations." *Green v. Dumke*, 480 F. 2d 624, 628 (9th Cir. 1973) (footnote omitted).

intrude into private relationships and are reflected in particular conduct. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

The Court has been presented with the state action issue in a variety of factual situations. As a result, the Court has approached this issue in an equally varied manner. *Amici* submit, however, that these seemingly diverse approaches reflect differing emphases of a singular unifying theme:

> State action is present where significant governmental interests are promoted by a pattern of regulation delegating state power to ostensibly private persons who then act with the force of law.

This theme is apparent in each of the following approaches employed by the Court:

1. Private parties who are clothed with state authority and act with the force of law. *United States v. Williams*, 341 U.S. 97 (1950); *United States v. Price*, 383 U.S. 787 (1965); *United States v. Guest*, 383 U.S. 745 (1965); *Griffin v. Maryland*, 378 U.S. 130 (1964).

2. Private parties whose conduct is subject to pervasive state regulation. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); *Burton v. Wilmington Parking Authority, supra; Moose Lodge No. 107 v. Irvis supra; Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); *Nixon v. Condon*, 286 U.S. 73 (1932).

3. Private action encouraged or compelled by state law and reflecting current state policy. *Reitman v. Mulkey, supra; Adickes v. S. H. Kress & Company*, 398

U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis, supra; Peterson v. City of Greenville,* 373 U.S. 244 (1963); *Lombard v. State of Louisiana,* 373 U.S. 267 (1963); *Robinson v. Florida,* 378 U.S. 153 (1964); *Nixon v. Condon, supra; McCabe v. Atchison, Topeka & Santa Fe R. Company,* 235 U.S. 151 (1914); *Evans v. Abney,* 396 U.S. 435 (1970); *Shelley v. Kraemer,* 334 U.S. 1 (1948).

4. Private action taken with reliance on state law, custom or usage. *Adickes v. Kress, supra; Evans v. Abney, supra.*

5. Private action involving the performance of traditional public functions delegated to private individuals. *Smith v. Allwright, supra; Terry v. Adams, supra; Nixon v. Condon, supra; Evans v. Newton,* 382 U.S. 296 (1966); *Marsh v. Alabama,* 326 U.S. 502 (1946).

6. Governmental action placing monopoly power in the hands of private entities to promote state policies. *Railway Employes' Dept. v. Hanson,* 351 U.S. 225 (1956); *International Ass'n of Machinists v. Street,* 367 U.S. 740 (1961); *Lathrop v. Donahue,* 367 U.S. 830 (1961)[4]; *cf. Steele v. Louisville & N. Ry.,* 323 U.S. 192 (1944); *American Communications Ass'n v. Douds,* 339 U.S. 382 (1950).

In essence, the Court has evaluated the pervasiveness of state intrusion into the quasi-private relationship and assessed the state interests reflected in the objectionable conduct. The Court's characterization of the state action issue in the foregoing cases demonstrates an attempt to identify particular state interests in variant circumstances. Thus, the linchpin of the Court's analysis, al-

[4]*See Lavoie v. Bigwood,* 457 F. 2d 713 (1st Cir. 1972), for the "monopoly" characterization of these Supreme Court cases.

though expressed in differing forms, contains a principled view of state action. Where this principle is operative, state action exists.

A closer review of the major decisions finding particular private conduct subject to the constraints of the Fourteenth Amendment illustrates the applicability of this principle.

The existence of a comprehensive state election code reflecting a systematic promotion of the state's discriminatory voting policy was sufficient to support a finding of state action in *Nixon v. Condon, Smith v. Allwright,* and *Terry v. Adams.* In each case, the statute guaranteed that a private political party could determine the qualifications of its members and thereby prohibit Negroes from participating in state primaries or the party's electoral process. Thus, the party was able to employ the state election code to enforce the state's "whites only" voting policy.

Describing the state's intrusion into the structure of private political parties, the Court observed:

> ". . . the statute here in controversy has attempted to confide authority to determine of its [Executive Committee's] own motion the requisites of party membership and in so doing to speak for the party as a whole." *Nixon v. Condon,* 286 U.S. at 85;
>
> ". . . the state [through its election code] endorses, adopts and enforces the discrimination against Negroes . . ." *Smith v. Allwright,* 321 U.S. at 664; and
>
> "It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary

> has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." *Terry v. Adams*, 345 U.S. at 469.[5]

By legislating the relationship between a private political party and the electorate in such a way as to guarantee the party's unfettered discretion in determining the qualifications of its members, the state: (1) governed the structure of private political parties, (2) delegated specific state functions to a private organization, and (3) enabled the private party to act with the force of law in promoting the state's discriminatory voting policy. Thus, all of the elements of the general state action principle coalesce in these cases.

State action has also been found in a series of cases concerning the regulation of private businesses affairs. In *Peterson v. City of Greenville*, 373 U.S. 244 (1963) and *Lombard v. State of Louisiana*, 373 U.S. 267 (1963), the Court dealt with municipal regulatory schemes[6] governing the relationship between restaurant proprietors and their customers. The delineation of the manner in which restaurant service was to be provided

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[5]In *Evans v. Newton*, 382 U.S. 296 (1966) the Court found sufficient "state action" where a city, pursuant to a privately created trust, managed a park which had become a public facility. Mr. Justice Douglas enunciated the Court's rationale:

> ". . . when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." 382 U.S. at 299.

See also Marsh v. Alabama, 326 U.S. 501 (1946) and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

[6]In *Peterson, supra*, a city ordinance established a detailed scheme for restaurant segregation. In *Lombard, supra*, the statements of public officials were held to be the legal equivalent of an ordinance determining the relationship between a restaurateur and his customers. 373 U.S. at 273.

manifested a distinct state policy favoring segregated eating facilities. As a direct result, restaurateurs structured their business operations so as to refuse service to Negroes. Such intensive control and impact established the prerequisites for state action.

The decision in *Robinson v. Florida*, 378 U.S. 153 (1964) further demonstrates the determinative impact of legislative policies on a particular private business relationship. In *Robinson* the municipal scheme only provided for segregated rest room facilities in restaurants. Relying on this enactment, restaurateurs enforced state policy by providing separate eating facilities for each race. By fashioning his business conduct in accord with the discriminatory policy, the restaurateur acted with the force of law.

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the United States Supreme Court reviewed a clause in the California Constitution which prohibited restrictions on an individual's right to sell or lease real property to whomever he chose. The Court affirmed decisions of the California Supreme Court[7] finding that the enactment of Proposition 14[8] constituted significant state involvement in private real estate transactions.

In reaching its conclusion, this Court focused on two crucial points: (1) the state had adopted, as current

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[7]*Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P. 2d 825, 50 Cal. Rptr. 881 (1966); *Prendergast v. Snyder*, 64 Cal. 2d 877, 413 P. 2d 847, 50 Cal. Rptr. 903 (1966).

[8]Proposition 14, adopted as Article I, §26 of the California Constitution provided that:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses."

policy, the right of private parties to discriminate in the sale or rental of real estate; (2) that private parties could now invoke state law to accomplish discrimination and were thereby encouraged to do so.

Assessing the ultimate effect or impact of Proposition 14, the Court concluded:

> "The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discrimination need no longer rely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources." 387 U.S. at 376, 377.

Thus, the state's intrusion into the private arena so permeated the transaction as to constitute state action.[9]

The Court's decision in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) is fully consistent with the state action principle enunciated herein. In *Moose Lodge*, the Court held that the mere existence of a liquor license did not involve the state in a private club's dis-

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[9]*See also McCabe v. Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151 (1914), where a state statutory scheme governed the relationship between common carriers and their customers, including the physical construction of railroad cars, in such a way that it injected a state racial policy into the operation of the railroad; and, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 173-74 (*see* accompanying n. 44) (1970), where the Court held that private parties who act with knowledge of and pursuant to state enforced "custom and usage" (42 U.S.C. §1983) act "under color of" law. As Mr. Justice Brennan stated, concurring in part and dissenting in part, "when private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action." 398 U.S. at 203.

criminatory guest or membership policies. The licensing provisions did not establish a regulated pattern of private conduct in the sale of liquor. Unlike the cases previously discussed, the legislative enactments in *Moose Lodge* in no way governed the discriminatory relationship between the club and the persons to whom it served liquor. Nor did the state in any way delegate its authority to the club in order to accomplish discrimination. The Court noted that a liquor license did not "in any way foster or encourage racial discrimination." 407 U.S. at 176, 177. Thus, the possession of a liquor license had no impact on the private conduct complained of, and could not serve as a basis for a finding of state action.[10]

Although no state action was found on the facts presented in *Moose Lodge*, the Court did reaffirm the basic principle guiding its approach to the state action question. Specifically, the Court indicated that had the regulatory scheme governed a liquor licensee's course of dealing with minorities or promoted a state policy favoring discrimination, then state action would have been present:

> "There is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination." 407 U.S. at 175, 176.

The foregoing analysis demonstrates that where significant state interests are implemented through a per-

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[10]Likewise in *Evans v. Abney*, 396 U.S. 435 (1970) the statutes authorizing the formation of wills did not clearly promote an identifiable state interest favoring discrimination, nor was there any evidence that the testator was persuaded or induced by the statute to discriminate.

vasive regulatory framework delegating state power to private individuals, the resultant conduct has the force of law and is subject to constitutional scrutiny.

II

The Application of the Principle Developed Herein Requires a Finding of State Action in the Instant Case.

An examination of the regulatory scheme involved in the instant case reveals that Pennsylvania has intertwined state policies with the operation of the so-called private utility company. Through extensive regulation and the state's Public Utility Commission, Pennsylvania has granted the utility a certificate of convenience or franchise and thus a virtual monopoly in an exclusive territory of service. 66 Purden's Pennsylvania Statutes (hereafter "P.S.") §§1121-1123.

The Commission regulates and must approve the rates which the utility charges its customers. 66 P.S. §§1141, 1142, 1149. The Commission is empowered to issue regulations necessary for supervision of utilities, including provisions for inspection and access to facilities and records of the utility. 66 P.S. §§1171, 1182, 1217, 1341, 1342, 1348. Discriminatory practices in rates and services are prohibited and all rules and regulations of the utility are subject to Commission approval. 66 P.S. §§1142, 1144, 1148, 1149, 1171, 1172, 1183, 1342.

The Commission's rate setting procedure requires that the utility must file a tariff with the Commission in compliance with its rules. The Regulation on Tariffs, §VIII, provides that:

> "Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly

> shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ." A. 84.

Pursuant to the regulation, the Metropolitan Edison Company filed in Tariff No. 41, its Rule 15 (issued April 30, 1971, effective June 30, 1971):

> "Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of non-payment of bills or violations of the Pennsylvania Utility Commission's or Company's rules and regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters, or other equipment of company." A. 46, 84.

Significant governmental interests are promoted by this regulatory scheme. Pennsylvania's citizens are assured of receiving electrical service, which has been characterized as a virtual "necessity of life to most if not all of its customers." *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F. 2d 153, 163 (6th Cir. 1973). Because the utility provides the service, the state has been saved the cost of directly providing electricity while assuring such service at reasonable rates. The lower the operating costs, the lower the rate to the customer. Lower operating costs are achieved by the unilateral termination of services without an evidentiary hearing. Finally, Pennsylvania directly benefits from its Utilities Gross Receipts Tax, 72 P.S. §§8101, *et seq.*, as did the city of St. Paul in *Ihrke v. Northern States Power Co.*, 459 F. 2d 566, 588 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972): "since the city received 5% of the Northern's gross earnings the city benefited from the payment of bills resulting from Northern's threatening to terminate services."

These state policies are secured through the aforementioned regulatory framework which delegates rule-making power to the utility. The respondent utility company was authorized to, and did in fact, promulgate Tariff No. 41 challenged herein. In short, the Tariff is a public rule which operates with the force of law.

Pennsylvania's comprehensive pattern of regulation delegates specific governmental functions to the utility in furtherance of previously identified state interests. The state has empowered the utility company to act as an arbiter in the settlement of disputes. This function is uniquely governmental. As Mr. Justice Harlan observed in *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971): "It is to courts, or other quasi-judicial bodies, that we ultimately look for implementation of a regularized, orderly process of dispute settlement." Indeed, the state has a "monopoly over techniques for binding conflict resolution. . . ." *Id.* Thus, only through Pennsylvania's transference of a portion of its monopoly power, does the utility derive its power to resolve conflicts.

Not only has the state ceded judicial power to the utility, but the regulatory scheme effectively confers the essentials of police power on the ostensibly private party. This enables the utility to perform a role normally accorded constables, sheriffs and marshals, *i.e.*, execution of judgments.

Thus, when the state abdicates these roles to so-called private persons, in the interest of economy, the functions still retain all of the characteristics of an act of the state. *Evans v. Newton*, 382 U.S. at 299;[11] *cf.*, *United States v. Williams*, 341 U.S. 97 (1950); *United*

[11] *See also, Hall v. Garson*, 430 F. 2d 430, 439 (5th Cir. 1970); *Scott v. Vandiver*, 476 F. 2d 238 (4th Cir. 1973).

States v. Price, 383 U.S. 787 (1965); *United States v. Guest*, 383 U.S. 745 (1965).

By virtue of its regulatory scheme, Pennsylvania has created a state sanctioned monopoly with power to legislate rules and practices for its customers. Where government confers the essentials of monopoly or legislative power on private entities to further specific policies, state action is present. In *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956) and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), such power was delegated to labor unions by statutes authorizing union shop agreements designating the union as the exclusive bargaining representative. *Cf., Steele v. Louisville & N. Ry.*, 323 U.S. 192, 198 (1944); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).[12] In *Hanson*, the Court recognized Congress' apparent desire to obtain "industrial peace and stabilized labor-management relations" (351 U.S. at 234) through union shop agreements.

Similarly, in *Lathrop v. Donahue*, 367 U.S. 820 (1961), required membership in an integrated state bar association, having authority to engage in legislative activity, constituted state action. The Court acknowledged that the state's interest in requiring membership in an integrated bar association, for the purpose of "raising the quality of professional services" was "legitimate". 367 U.S. at 843. Thus, in both instances, governmental placement of monopoly power in the hands of private entities to promote significant interests resulted in a finding of state action.

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[12]"But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by the Government itself." 339 U.S. at 401.

In the instant context, Metropolitan Edison Company's delegated monopoly power to dictate the terms and conditions under which it provides electrical services to its customers parallels that possessed by the above-mentioned labor unions and integrated bar association. In each instance, the rules promulgated by the private entity, as they relate to identifiable governmental interests, have the force of law. Indeed, where, as here, the private entity provides a service which is so uniquely "affected with a public interest it ceases to be *juris privati* only." *Munn v. Illinois,* 94 U.S. 113, 126 (1877).

The general state action principle developed and applied herein demonstrates that analysis should focus on the relationship between significant and identifiable state interests and the conduct complained of. Where these interests are intertwined and promoted through particular conduct, state action is present.

Courts of Appeal, in considering whether summary terminations of utility service violate due process, have, by and large, confined their analyses to the question of whether state statutes or regulations expressly authorize said terminations. *But see, Ihrke v. Northern States Power Co.,* 459 F. 2d 566 (8th Cir.), *vacated as moot,* 409 U.S. 815 (1972). Where such specific authorization exists, state action has been found. *Palmer v. Columbia Gas of Ohio, Inc.,* 479 F. 2d 153 (6th Cir. 1973). Where specific authorization is absent, the courts have refused to find state action. *Jackson v. Metropolitan Edison Company,* A. 76-92; *Lucas v. Wisconsin Electric Power Company,* 466 F. 2d 638 (7th Cir. 1972), *cert. denied,* 409 U.S. 1114 (1973). *Amici* submit that the absence of express state statutory or regulatory authorization is not dispositive of the

state action issue.[13] As prior decisions of this Court teach, no one factor or test provides the exclusive answer to this question. *See* pages 8-11, *supra*. Rather, the entire fabric of state interests, regulations, and delegation of power to private entities must be examined. Where examination of this fabric reveals that significant state interests are promoted through particular conduct, then the ostensibly private party acts under color of law and within the ambit of the Fourteenth Amendment.

Conclusion.

For the above-stated reasons, the decision below should be reversed.

Respectfully submitted,

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April 22, 1974.

[13]Where the state affirmatively sanctions the objectionable conduct in the context of a pervasive regulatory scheme, state action is clearly present, as in the paradigm case of *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952).

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A.D. 1974.

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